IN THE SUPREME COURT OF MISSOURI

Case No. SC92062

PAT DUJAKOVICH, et al.,

Appellants,

vs.

ROBIN CARNAHAN, et al.

Respondents.

Appeal from the Circuit Court of Cole County
Case No. 10AC-CC00546
Honorable Jon E. Beetem

BRIEF OF RESPONDENTS TRAVIS BROWN, SCOTT CHARTON AND LET VOTERS DECIDE (INTERVENORS)

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STATEMENT OF FACTS

This case was decided on motions to dismiss filed by the Respondents below. The facts applicable to such a motion are determined by the standard of review for such a motion, specifically that all properly pleaded facts are taken as true while conclusions of law are ignored. *See* Standard of Review section of brief, *infra*. Appellants' Statement of Facts contains extraneous material not found in the legal file and sets out legal conclusions. The relevant and material properly pleaded facts from the petition are set out below.

This action concerns an initiative petition, Initiative Petition 2010-077, relating to local government earnings tax. The initiative petition was attached to the Second Amended Petition, L.F. 101-106. Initiative Petition 2010-077 was submitted to the voters of Missouri on November 2, 2010, and enacted by a majority of those voting on the question. Second Amended Petition, ¶25, L.F. 90. The enactment repealed twelve sections in chapter 92 of the Revised Statutes dealing with an earnings tax and enacted five new sections in their place. L.F. 101-106.

Under the new enactment, cities no longer had the authority to impose an earnings tax after December 31, 2011. §92.110.1, RSMo, in Initiative Petition, L.F. 101. A statutory exception was provided for those cities which had imposed an earnings tax at the time of enactment. L.F. 101. Those cities "may continue to impose the earnings tax if it submits to the voters of such city pursuant to section 92.115, the question whether to continue such earnings tax for a period of five years and a majority of such qualified voters voting thereon approve such question[.]" L.F. 101 & §92.115.1, RSMo, in

Initiative Petition, L.F. 101-102. If the voters do not approve the earnings tax, the city's authority to impose the tax expires on December 31, 2011. L.F. 101-102. If they approve the tax, it is for a period of five years and the tax sunsets at the end of that five year period unless the city obtains voter approval to continue it for another five year period (and for subsequent five year periods). L.F. 101-102.

Cities already imposing an earnings tax are not required by the initiative legislation to take advantage of the exception for continued authorization to impose and levy the tax. L.F. 101-102. At any time that a city no longer is authorized to impose and levy the tax, whether by opting to not submit the issue to the local voters or by voters disapproving the tax, the tax is to be phased out over a ten year period. §92.115.2, RSMo in Initiative Petition, L.F. 102. Initiative Petition 2010-077 did not include any provision which imposed a new tax or fee or create a new source of revenue for any election a city would opt to hold to obtain voter authorization for the earnings tax. Second Amended Petition, ¶ 29, L.F. 91.

As noted above, the voters of the State enacted these provisions by initiative and they became effective on November 2, 2010. Second Amended Petition, ¶33, L.F. 8. The City of Kansas City, Missouri, which is not a party to this action, called a special election on April 5, 2011, for the purpose of determining whether the earnings tax should be continued for a period of five years. The voters of the City approved the measure. L.F. 200.

The City of Kansas City is a constitutional charter city. Second Amended Petition, ¶ 9, L.F. 87. In 1963, the Missouri Legislature enacted Sections 92.210 through

92.300, which enabled qualifying cities to enact an earnings tax and it was under the authority of these sections that the City of Kansas City amended its charter that same year to authorize an earnings tax. Second Amended Petition, ¶¶12-14, L.F. 87-88. An ordinance levying a one-half percent earnings tax was also adopted by the city council that same year. Second Amended Petition, ¶15, L.F. 88. The earnings tax provision in the city charter was amended in 1970 to increase the percentage of the earnings tax to one percent. Second Amended Petition, ¶16, L.F. 88. The City of Kansas City levied a one percent earnings tax in accordance with this amendment.[1] Second Amended Petition, ¶26, L.F. 90. A comprehensive revision to the city charter in 2006 carried over the earlier charter provision authorizing an earnings tax in the amount of one percent. Second Amended Petition, ¶17, L.F. 88.

If, pursuant to the measures enacted by voter approval of Initiative Petition 2010-077, the City of Kansas City opted to impose an earnings tax by having the issue submitted to the voters for authorization by local election, the cost of submitting the question to Kansas City voters would be at least $200,000, where the only question submitted to the voters in the election was the authorization of the earnings tax. Second Amended Petition, ¶ 27, L.F. 90-91. Any subsequent election at which the City of Kansas City sought to re-submit the issue to the voters for another five year authorization would also be at least $200,000. Second Amended Petition, ¶ 27, L.F. 90-91. If the issue

[1] The petition was silent on when the one percent earnings tax was initially approved by the voters of the City but there is no dispute that this occurred sometime prior to 2006.

was submitted at an election with other candidates or issues on the ballot, there would be publication costs associated with the issue of authorization of the earnings tax, although these costs are not stated. Second Amended Petition, ¶ 28, L.F. 91.

The amount of revenue generated by the City's one percent earnings tax was $203,332,474 during fiscal year 2010 (May 1, 2009 to April 30, 2010). Second Amended Petition ¶30, L.F. 91.

Standard of Review

(Responds to Appellants' Standard of Review Under All Points and Argument Under All Points Related to that Standard)

A dismissal for failure to state a claim for relief is reviewed *de novo* on appeal. *Weber v. St. Louis County, IESO MO*, 342 S.W.3d 318, 321 (Mo. banc 2011). All averments of the petition are taken as true and the plaintiff is liberally granted all reasonable inferences arising from those averments. *Id.* Mere conclusions of law will not be considered in determining whether the plaintiffs have stated a claim for declaratory relief. *State ex rel. City of Creve Coeur v. St. Louis County*, 369 S.W.2d 184, 187 (Mo. 1963).

Common to all points of argument presented by Appellants is their contention that in an action for declaratory judgment, a dismissal for failure to state a claim that considers the legal substance of the matter is never appropriate. Appellants argue that the court does not rule on the merits of the case when considering a motion to dismiss a petition for declaratory judgment, *citing City of Creve Coeur v. Creve Coeur Fire Protec. Dist.*, 355 S.W.2d 857, 859-860 (Mo. 1962). Appellants also cite to *State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 340 (Mo. App. E.D. 2008), and *Sandy v. Schriro*, 39 S.W.3d 853, 855 (Mo. App. W.D. 2001).

Appellants (and in like regard, *American Eagle Waste Industries* and *Schriro*) misread the *City of Creve Coeur v. Creve Coeur Fire Protec. Dist.* case. The underlying action of the trial court in that case was not a dismissal for failure to state a claim for relief. Rather, the petition was challenged on jurisdictional grounds, specifically with

reference to the declaratory judgment whether a justiciable controversy existed between the parties and the trial court ruled the case in favor of defendants on the basis of a lack of jurisdiction. 355 S.W.2d at 858-859. The ruling in the case and the Court's language must be read in the context of the basis for the dismissal. The Court was not ruling that a motion to dismiss for failure to state a claim for relief was improper in a declaratory judgment action since that was not the grounds on which the case was dismissed.

Significant to the appropriateness of dismissing a declaratory judgment action for failure to state a claim for relief, one year after *City of Creve Coeur v. Creve Coeur Fire Protec. Dist.* in another case involving the City of Creve Coeur, the Court affirmed the dismissal of a declaratory judgment action on the basis that it failed to state a claim for relief. *State ex rel. City of Creve Coeur v. St. Louis County*, 369 S.W.2d 184, 187 (Mo. 1963). In this later case involving the City of Creve Coeur, the plaintiffs had sought a declaration that a particular ordinance was illegal, invalid, unlawful and unconstitutional and, thereby, could not be enforced. *Id.* The Court ruled on the substantive merits of the case in affirming the dismissal for failure to state a claim.

Two more recent cases of the Court also show that *City of Creve Coeur v. Creve Coeur Fire Protec. Dist.* is not an impediment to the trial court dismissing the case for failure to state a claim. In *Webber v. St. Louis County, IESI MO*, 2010 WL 4628625, *5-*6 (Mo. App. E.D. 2010), transferred, *Weber v. St. Louis County, IESI MO*, 342 S.W.3d 318 (Mo. banc 2011),[2] the Court of Appeals reversed the trial court's dismissal for failure

[2] The spelling of the plaintiff changed in the official reported version of the case.

to state a claim on the basis of *State ex rel. American Eagle Waste Industries v. St. Louis County* and *City of Creve Coeur v. Creve Coeur Fire Protec. Dist.* Yet this Court transferred the case and affirmed the trial court's dismissal, deciding the substantive merits underlying the request for a declaration. 342 S.W.3d at 321-322. In *Thompson v. Hunter*, 2003 WL 345371, *4-*5 (Mo. App. 2003), transferred 119 S.W.3d 95 (Mo. banc 2003), the Court of Appeals similarly reversed the grant of dismissal for failure to state a claim on a Hancock Amendment challenge on the basis of *City of Creve Coeur v. Creve Coeur Fire Protec. Dist.* Similarly, in transferring the case, this Court affirmed the circuit court's dismissal for failure to state a claim and ruled on the basis of the substance of what was the request for declaratory relief. 119 S.W.3d at 100-101. Clearly what these three cases show is that declaratory judgment actions can be dismissed for failure to state a claim for relief when the pleadings establish that the plaintiff is not entitled to the declaration it seeks, even though ruling on the motion involves addressing the substance of the case. Judicial efficiency and common sense direct that the court and a defendant not be required to expend the time, effort and expense of a trial or other proceedings beyond a motion to dismiss when the plaintiff's petition establishes that it has not stated facts which would support a declaration or supplemental relief in its favor.

Nor does this approach contravene the language of the declaratory judgment rules or statutes or the intended effect of those provisions. "A declaratory judgment action brought under Ch. 527 and Rule 87.01 is a civil action as that term is used in Rule 42.01 because it involves private rights and duties . . . and therefore the conventional rules of civil practice and procedure apply in the absence of provisions to the contrary." *State*

Farm Mutual Automobile Ins. Co. v. Johnson, 586 S.W.2d 47, 55-56 (Mo. App. 1979). No special rules of practice or procedure have been established for declaratory judgment actions. *Id.* The essential purpose of a declaratory judgment action is to terminate a controversy or remove an uncertainty through a judgment or decree. *See, e.g.*, Mo. R. Civ. Pro. 87.02(d) and §527.050, RSMo. In addition, orders, judgments and decrees issued under Rule 87 or Chapter 527 are treated as any other order, judgment and decree. Mo. R. Civ. Pro. 87.11; §527.070, RSMo. Clearly a controversy is terminated or an uncertainty is removed when a plaintiff's allegations are taken as true for purposes of a motion to dismiss for failure to state a claim, those facts establish that the plaintiff is not entitled to the declaration which it seeks, and the court enters a judgment of dismissal on those grounds, i.e., a judgment on a dismissal that is with prejudice. The plaintiff in those circumstances is no less certain of its rights or obligations and no more subject to a continuing controversy than if it had been allowed to proceed to trial and on those same facts obtained a judicial statement that it was not entitled to the declaration it sought. It flies in the face of practicality and principles of judicial economy and efficiency to remand this case for further proceedings.

Even if *City of Creve Coeur v. Creve Coeur Fire Protec. Dist.* applied in this instance, Appellants ignore that the Court stated that dismissal was appropriate when "it is obvious beyond peradventure of doubt that any claim for a declaration of rights under any construction of the statutes in question is wholly without substance" and that if it appears with certainty that the plaintiff is not entitled to the declaration it seeks under the averments of its petition, then its petition is subject to dismissal. 355 S.W.2d at 859-860.

As the discussion of the merits under the separate points below will show, this standard is met.

Further, "in [declaratory judgment] cases where trial courts err procedurally by deciding merits where they should not, courts of appeal have chosen nevertheless to review the merits when a remand would be futile." *Clifford Hindman Real Estate, Inc. v. City of Jennings*, 283 S.W.3d 804, 808 (Mo. App. E.D. 2009). Such a situation exists when the trial court enters a dismissal for failure to state a claim for relief and it is clear that the plaintiff is precluded from re-filing the same cause of action or that no fresh look of the facts in light of the law will occur on remand. *State ex rel. American Eagle Waste Industries*, 272 S.W.3d at 341. In addition, on appeal the appellate court is to give such judgment as the court "ought to give" and "[u]nless judgment otherwise requires, the court shall dispose finally of the case." Mo. R. Civ. Pro. 84.14.

Remand of this case is not required even though the Court can consider the merits of the trial court's judgment and affirm its decision. The trial court (and by extension this Court) was permitted to treat the motions to dismiss as motions for judgment on the pleadings. *In re Marriage of Busch*, 310 S.W. 3d 253, 259 (Mo. App. E.D. 2010). Appellants are in no worse position by this Court finally disposing of this matter as a motion for judgment on the pleadings as it may under Rule 84.14. All properly pleaded facts are being taken as true, those facts will not change on remand, there are no material issues of material fact for that very reason, the controversy was sufficiently concrete, and only questions of law remain to be resolved. *See, Eaton v. Mallinckrodt, Inc.*¸224 S.W.3d 596, 599 (Mo. banc 2007). Given the futility of remanding this case for further

proceedings since a fresh look on remand is precluded, it is within this Court's power under Rule 84.14 to affirm the trial court's judgment and finally dispose of this case.

Finally, if Appellants are correct concerning the meaning of *City of Creve Coeur v. Creve Coeur Fire Protec. Dist.*, this case presents the opportunity for the Court to review that case and to overrule any such construction that would prevent a dismissal for failure to state a claim under circumstances as presented here.

ARGUMENT

I.

(Responds to Point I of Appellants' Brief)

Point I of Appellants' brief concerns the trial court's ruling on Count II of the Second Amended Petition. The gravamen of that count was a challenge to the Initiative Petition as constituting an appropriation measure in violation of Article III, §51, of the Missouri Constitution. L.F. 92-94. The claim as contained in the Second Amended Petition was that Article III, §51, provides that "[t]he initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby[.]" Appellants below and before this Court do not point to any language in the Initiative Petition which actually appropriates money for a specific purpose or attempts to do so. L.F. 92-94. Rather, they argue the Initiative Petition involved a de facto appropriation because an initial election would need to be held to authorize the City to impose an earnings tax subsequent to December 31, 2011, and, if approved, every five years afterward, and elections cost money. L.F. 92-93. The trial court ruled that the Initiative Petition "terminates the prior authority of the City of Kansas City (the "City") to impose an earnings tax absent a vote of the citizens of the City." L.F. 203. Accordingly, the City could choose either to seek authority to impose a tax after its authority terminated on December 31, 2011, or not, but in any event, "[t]his was a choice to be made by the City and as such, does not constitute an appropriation by initiative." L.F. 203.

Appellants make both a procedural and substantive argument with respect to the dismissal of Count II. Procedurally, they argue that a declaratory judgment claim cannot

be dismissed for failure to state a claim for relief when a ruling on such a defense would rule on the merits. Brief of Appellants at 14-15. As shown in the discussion of the Standard of Review above, this is an incorrect contention. The discussion in the Standard of Review is incorporated by reference here. It was not error for the trial court to dispose of the case on the motion to dismiss and it is proper for this Court to affirm that judgment on the substantive merits.

The order of the trial court on Count II reads as follows:

> Initiative Petition 2010-077 proposed by and adopted by the people terminates the prior authority of the City of Kansas City (the "City") to continue to impose an earnings tax absent a vote of the citizens of the City. Should the City choose not to have an earnings tax in the future, they must now have an election. This is a choice to be made by the City and as such, does not constitute an appropriation by the initiative. Accordingly, Count II fails to state a claim upon which relief may be granted and is dismissed with prejudice.

L.F. 203.

Appellants' argument ignores the language of the trial court's order, specifically that the effect of the plain language of the statute is to terminate any present authority to impose earnings tax on December 31, 2011. Instead, the focus of the argument of the citizen-taxpayer parties is to speculate on what the policy decisions of a non-party to the action – the City of Kansas City and its governing body – will be and how it will view the policy alternatives available to it. They wish to characterize the City of Kansas City as

facing a "Hobson's choice," between maintaining the status quo of an existing earnings tax or foregoing such a tax, Brief of Appellant's at 22, but the reality is that as the trial court correctly determined, the so-called status quo has already ceased to exist. The City of Kansas City was no longer authorized to impose the existing earnings tax after December 31, 2011. As set out in the argument, *infra*, responding to Point VII of Appellants' brief, the City's power to tax remains subject to the power of the State to withdraw that authority at any time or to set conditions on the exercise of the authority to impose a new tax.

An appropriation act involves setting apart or designating a certain amount of public monies from a public fund to be used for the purpose identified in the appropriations legislation. *State ex rel. McKinley Pub. Co. v. Hackman*, 282 S.W. 1007, 1010-11 (Mo. banc 1926). Appropriation acts are distinguishable from enabling acts, the former relating specifically to the expenditure of funds, the latter providing the underlying authority for the action for which the public funds are to be expended. *Id.* In the context of Article III, §51, the courts have recognized that the distinction between an enabling act and an appropriations act may become blurred in effect:

> While the proposed amendment does not in terms and in and of itself appropriate the money necessary to pay the compensation it mandates, it leaves no discretion to the city manager or the city council and in effect is an appropriation measure. By its plain intendment it requires the budget official to include the specified compensation in the budget, and requires the city council to approve it, regardless of any other financial

considerations. The proposed amendment has the same effect as if it read that the sums necessary to carry out its provisions stand appropriated.

State ex rel. Card v. Kaufman, 517 S.W.2d 78, 80 (Mo. 1974).

The other cases on the clause similarly make clear that the tipping point for whether initiative legislation is an appropriation is whether there is any discretion in the governmental entity with respect to the action which involves an expenditure of funds. Thus, in *Kansas City v. McGee*, 269 S.W.2d 662, 666 (Mo. 1954), the initiative legislation "does not leave any discretion to the City Council." Similarly, in *State ex rel. Sessions v. Bartle*, 359 S.W.2d 716, 719 (Mo. 1962), the proposed initiative ordinance mandated wage schedules that automatically increased salaries for existing employees.

The one element that is necessary for the so-called "*de facto* appropriation" to exist under Article III, Section 51, is missing in this instance. The City of Kansas City is not required to impose an earnings tax under the provisions of the Initiative Petition. That is a matter solely discretionary to it. The citizen/taxpayer parties to this action may have their own opinions on how the City should decide between the choices it faces but it is the governing body of the City which must determine in its own discretion whether it wants to continue to impose such a tax or not. If, in making the policy decision on the taxes it wants to levy, the City decides an earnings tax should be among the repertoire of taxes it collects, as a condition of the exercise of that power it must submit the measure to its voters. However, if the issue is submitted to the local voters, it is not because of any

mandate found in the state statute to impose an earnings tax because no such mandate exists.

A useful way to look at this issue is that, in *Card*, *McGee*, and *State ex rel. Sessions v. Bartle*, 359 S.W.2d 716 (Mo. 1962), the condition requiring the expenditure of funds was final and complete without further action by the governing body of the City. It was a ministerial function that was subject to a judgment in mandamus to compel compliance. Here the condition requiring the expenditure is not final but is dependent on the governing body first making a policy decision. The courts could not enter an order directing the City of Kansas City, in this instance, to adopt an ordinance to continue its earnings tax.

In the distinction drawn in *State ex rel. McKinley Pub. Co. v. Hackman* between enabling acts and appropriations acts, the Initiative Petition is an enabling act. There is no appropriation of the City's money – *de jure* or *de facto* – by the initiative.

II.

(Responds to Point II of Appellants' Brief)

As Appellants correctly point out, the trial court's ruling should be affirmed if it can be sustained on any of the grounds raised in the motion to dismiss, whether those grounds were addressed in the court's order ruling the motion or not. Brief of Appellants at 23, *citing Kixmiller v. Board of Curators of Lincoln University*, 341 S.W.3d 711, 713 (Mo. App. W.D. 2011). There were two alternative grounds supporting dismissal advanced below, one by Intervenors Respondents and one by the State Respondents. For purposes of brevity, Intervenors Respondents will not separately argue the grounds raised by the State Respondents in this brief but do concur in that position and incorporate by reference the argument the State Respondents make in response to Appellants.

A.

Appellants make the same procedural argument with respect to the alternate grounds for dismissal as made in their first point and which are addressed by Respondents in the Standard of Review section of this brief. That discussion is incorporated by reference here.

B.

The trial court's ruling on Count II may also be affirmed on the basis that Article III, §51, does not apply to state-level legislation dealing with the powers of an inferior political subdivision. The Initiative Petition was the enactment of a statute and is neither an amendment of the City of Kansas City's charter nor the enactment of a city ordinance. It is the exercise of the specific power contained in Article VI, Section 19(a) of the

Missouri Constitution reserved to the State to limit or deny by statute the charter power of a constitutional charter city. Mo. Const. Art. VI, §19(a). The scope of Article VI, Section 19(a) is discussed *infra* in detail in the response to Appellants' Point VII. That discussion is incorporated by reference.

As the cases on Article III, Section 51 show, the No Appropriations Clause applies only when the voters of a particular governmental jurisdiction approve a measure by initiative that has the effect of requiring a non-discretionary expenditure of funds by that same particular governmental jurisdiction. Thus, in *Card*, it was an initiative that proposed an amendment to the City's charter relating to the compensation to be paid local firemen and repealed all ordinances and charter provisions inconsistent with the initiative measure; in *McGee*, the initiative proposed an ordinance that would have established a firemen's pension plan; and in *Sessions*, the initiative involved a proposed ordinance establishing a classification and compensation plan for identified city employees. The intent of Article III, Section 51, when the initiative is exercised at the local level, is to prevent the voters of a local jurisdiction from potentially violating budget laws and process limitations placed on that local jurisdiction. *See, e.g., McGee*, 269 S.W.2d at 665. Article III, Section 51 is intended to act wholly internal to a single jurisdiction and is not intended to restrain the retained power under the state constitution of a superior governmental authority.

III.

(Responds to Point III of Appellants' Brief)

Point III of Appellants' brief concerns the trial court's dismissal of the count in the Second Amended Petition claiming the Initiative Petition violated the unfunded mandate portion of the Hancock Amendment, Article X, Sections 16 and 21. On this count, the trial court concluded that there was no violation of the unfunded mandate provisions for the same reasons it dismissed Count II, i.e., the Initiative Petition terminated the authority of the City of Kansas City to impose an earnings tax effective December 31, 2011, and any action to impose an earnings tax after that date was purely discretionary and voluntary on the part of the City. L.F. 203.

Appellants base their Hancock Amendment challenge on their mischaracterization of the issue as "whether the City is required to engage in a new activity in order to continue an existing activity." Brief of Appellants at 35. Appellants, however, arrive at this statement of the issue only by ignoring the first sentence of the trial court's judgment: "Initiative Petition 2010-077 proposed by and adopted by the people terminates the prior authority of the City of Kansas City (the "City") to continue to impose an earnings tax absent a vote of the citizens of the City." L.F. 203 (emphasis added). The Appellants' argument is premised on the belief that the City had a continuing—and in their view, a perpetual—authority to impose an earnings tax.

Appellants rely principally on *Missouri Municipal League v. State*, 932 S.W.2d 400 (Mo. banc 1996), in their argument. That case, Appellants claim, stands for the proposition that "once the state imposes a requirement on a political subdivision, it makes

no difference whether the underlying act is discretionary for purposes of determining it there is a Hancock violation." Brief of Appellants at 37. Appellants reading of *Missouri Municipal League* is superficial, at best, and wrong in the applications they attempt to make of it to this matter. *Missouri Municipal League* does not apply here. Rather, as shown below, this case comes squarely within the rule of *City of Jefferson v. Missouri Department of Natural Resources*, 863 S.W.2d 844, 848 (Mo. banc 1993). *Missouri Municipal League* involved a situation not found here.

In *Missouri Municipal League*, the Court was concerned with the No Reduction of State Funding clause of the Hancock Amendment, which provides, "The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions." 932 S.W.2d at 402, *quoting*, Mo. Const. Art. X, §21. Water testing—the activity at issue in *Missouri Municipal League*—was a permitted activity before the passage of the Hancock Amendment, after the passage of the Hancock Amendment, at and after the time of the case, and, presumably, to the present day. The Hancock Amendment became implicated because the state fully funded water testing for all suppliers of water, including cities, before the adoption of the Hancock Amendment. Subsequent to that date, legislation was enacted which required water suppliers to pay the cost of the testing of their water supplies. According to *Missouri Municipal League*, as pertained to cities, "[r]equiring water suppliers to pay the cost of testing, therefore, constitutes a reduction in the state financed proportion of the costs of water testing." *Id.*

The State sought to avoid application of the No Reduction of State Funding clause by arguing that the city was engaging in a proprietary function in providing water to its citizens, within the traditional distinction between proprietary *versus* governmental functions of municipal functions. Because a water utility was a traditional proprietary function, providing water was not an activity required of cities, the State's argument concluded. This Court ruled that application of the Hancock Amendment's No Reduction of State Funding clause did not follow the traditional governmental-proprietary function doctrine. *Id*. at 402-403. The Court also went on to say with respect to the rule applied in the *City of Jefferson* case, "This Court held [in *City of Jefferson*] that there was no express statutory language requiring a municipality to join a solid waste management district." *Id.* at 403.

The dichotomy between this case and *Missouri Municipal League* are patently obvious. First, this case does not involve the No Reduction of State Funding clause of the Hancock Amendment. Second, neither the trial court's judgment nor the motions to dismiss filed below were predicated on the governmental-proprietary function doctrine relating to municipal corporations. The Respondents did not argue and the trial court did not rule the levying of a tax to be a proprietary function. Taxation is the quintessential governmental function. As the quintessential governmental function and within the law applicable to municipal corporations, it is a governmental power that must be specifically granted to municipal corporations and is capable of being withdrawn from them. *Berry v. State*, 908 S.W.2d 682, 685 (Mo. banc 1995); *Whipple v. City of Kansas City*, 779 S.W.2d 610, 613 (Mo. Ct. App. 1989). As the trial court held in language that is

conveniently ignored by Appellants, the City's authority to impose an earnings tax was withdrawn by the statute enacted through the initiative—in the trial court's words, the authority was "terminated." L.F. 203. This highlights the third distinction between this appeal and *Missouri Municipal League*. In *Missouri Municipal League*, the authority for a city to provide water was a continuing one. Here the authority to tax has been terminated. Subsequent to the termination of that authority, in this Court's words from *Missouri Municipal League*, "there was no express statutory language [in the statute enacted by initiative] requiring a municipality" to impose an earnings tax. If the City of Kansas City wishes to avail itself of the authority to impose an earnings tax after the termination of the former authority on December 31, 2011, it was a voluntary decision on its part.

The trial court was correct in its dismissal of Count III. The Initiative Petition involves voluntary action by a constitutional charter city. The enacted measures do not require a city to impose an earnings tax. The language of the measures is "may continue to impose or levy an earnings tax." L.F. 101-102. Not only is the discretionary term "may" used but other language in the measures enacted clearly indicates that the election of which Appellants complain is the result of a voluntary decision, legislative in character, on the part of the City of Kansas City. Section 92.125 provides, "If no election is held pursuant to section 92.115, or if in an election held to continue to impose or levy the earnings tax. . . ." §92.125, RSMo, in Attachment A to Second Amended Petition, L.F. 102.

This is language denoting that a city has the option of including the earnings tax among its sources of revenue or not, as it sees fit. Similar language is found in Section 92.110.1, RSMo. This election is something that must be affirmatively submitted to the voters of the local jurisdiction, L.F. 101-102, but no such issue will be submitted to the local voters unless the governing body of the city first exercises it discretion to do so. As noted above, there is nothing in the measures enacted by the approval of the initiative petition which mandates the city impose an earnings tax in the first instance.

For purposes of the unfunded mandate provision of the Hancock Amendment, where a statute is permissive in allowing cities the option to engage in an activity or to forego it, there is no mandate. *City of Jefferson v. Missouri Department of Natural Resources*, 863 S.W.2d 844, 848 (Mo. banc 1993). If there is no mandate, there is no Hancock Amendment violation. *Id. See, also, School District of Kansas City v. State*, 317 S.W.3d 599, 611 (Mo. banc 2010) (no mandate because statute did not require school districts to establish charter schools, it merely authorized them to do so).

Here, there was no requirement that the City of Kansas City opt to have an earnings tax after December 31, 2011. The initiative petition terminated the authority of the City to impose an earnings tax as of that date but gave it the option to impose such a tax after that date for a five year period, setting the conditions for the exercise of that power. Whether the City was to impose the tax after December 31, 2011, was a voluntary choice the City would make when deciding what statutorily available revenue sources were appropriate for funding its operations.

Appellants contend that it is the election authorizing the earnings tax beyond the statutory lapse date that is mandated and that this is what constitutes the violation of the unfunded mandate provision of the Hancock Amendment. However, the requirement for an election comes after the voluntary and discretionary decision point on whether to impose the earnings tax or let it lapse, not before it. The necessity for holding an election if it is decided to impose the tax in question may be a consideration weighed by the City Council in making its discretionary decision but the necessity for an election only comes into existence after the voluntary decision to impose an earnings tax is made. There is nothing in the plain language of the Hancock Amendment or the cases applying it that would allow a local government to exercise its discretion to exercise a power or undertake an activity or service but then avoid any statutorily-imposed pre-condition for exercising that power or engaging in that activity or service. The initiative petition does not run afoul of the Hancock Amendment.

IV.

(Responds to Point IV of Appellants' Brief)

As Appellants correctly point out, the trial court's ruling should be affirmed if it can be sustained on any of the grounds raised in the motion to dismiss, whether those grounds were addressed in the court's order ruling the motion or not. Brief of Appellants at 23, *citing Kixmiller v. Board of Curators of Lincoln University*, 341 S.W.3d 711, 713 (Mo. App. W.D. 2011). In Point IV of their brief, Appellants address another ground for dismissal that was raised with regard to the Hancock Amendment issue presented by Appellants. Point IV of the brief concerns the argument that there was no violation of the Hancock Amendment because the Initiative Petition does not involve a local government activity or service but the power of taxation of the local government which constitutionally remains under the authority of the State to grant, withhold or condition, and outside the limitations of the Hancock Amendment.

A.

Appellants make the same procedural argument with respect to the alternate ground for dismissal as made in their first point and which are addressed by Respondents in the Standard of Review section of this brief. That discussion is incorporated by reference here.

B.

The unfunded mandate aspect of the Hancock Amendment speaks in terms of activities or services. Article X, Section 16, refers to "new or expanded activities," in the limitations it imposes, while Article X, Section 21, uses the language, "activity or

service." Mo. Const. Art. X, §§16 & 21. The Initiative Petition did not involve either an activity or a service as contemplated by these provisions. The measures enacted through the initiative petition involve the exercise of the power of taxation and a condition necessary or incident to the exercise of that power by a constitutional charter city. Nothing in the unfunded mandate provisions of the Missouri Constitution purports to act as a restriction on the power of the State to set conditions on the exercise of powers by local governments.

As recognized by the state constitution, taxation is a power, not an activity or service. *See, e.g.*, Mo. Const. Art. X, §1 ("taxing power"); Mo. Const. Art. X, §2 ("power to tax"). In *Whipple v. City of Kansas City*, 779 S.W.2d 610, 613 (Mo. App. 1989), the court stated:

> A city has no inherent power to tax. The power may be delegated to the city by the state but the authority must be expressly granted or necessarily incident to the powers conferred. In case of doubt, the power to tax is denied.

Similarly, in *Holland Furnace Co. v. City of Chaffee*, 279 S.W.2d 63, 69 (Mo. App. 1955), it was noted that "Cities and like municipal corporations have no inherent power to levy and collect taxes, but derive their powers in that respect from lawmaking power." Finally, the character of a tax indicates it cannot be an activity or service as contemplated by the Hancock Amendment: "Taxes are proportional contributions imposed by the state upon individuals[.]" *Taylor v. Gehner*, 45 S.W.2d 59, 60 (Mo. banc 1930). Taxes take

from individuals who come within the taxing jurisdiction of the city. They are not something tangible or intangible that is provided to those within the city's limits.

For purposes of the Hancock Amendment, the term service refers to governmental action performed for the benefit of the political subdivision's residents. *Boone County Court v. State*, 631 S.W.2d 321, 325 (Mo. banc 1982). Activity is defined as the operations and functioning of government in performing those services. *Id.* *Berry v. State*, 908 S.W.2d 682, 685 (Mo. banc 1995), also reinforces that the Hancock Amendment's unfunded mandate provision relates to governmental operations providing public goods or services, referring to "increased levels of operation" by the cities. Further, as pointed out in *Neske v. City of St. Louis*, 218 S.W.3d 417, 421-422 (Mo. App. 2007), the Hancock Amendment "prevents the State from requiring local governments to begin a new mandated activity, or to increase the level of a previously mandated activity beyond its 1980-1981 level, without appropriation of sufficient state monies to finance the costs of the new or increased activity." This language highlights the distinction between an activity or service and a power, specifically the power to tax. A local government or city is not mandated to impose a tax. It is authorized to do so, subject to the conditions set on the exercise of that authorization. As shown *supra* in response to Points I and III of Appellants' brief, the local government must make a discretionary choice whether it wants to avail itself of the authorized power, a choice that necessarily entails a decision to be subject to the conditions placed on the exercise of the authorized power.

In its argument, the Appellants focus on the word "any" in the two provisions and virtually ignores the words that adjective modifies—"service" or "activity." Brief of Appellants at 41-43. They also attempt to dissect the power to tax and to separate the power from the authorization. In doing so, they focus on the condition of voter approval as a new activity as though the power to tax exists before and independently from the circumstances which must be in place before the power is granted. The two cannot be separated—if there is no prior voter approval, there is no power to tax.

Appellants also attempt to argue that the power to tax is itself an "activity" within the contemplation of the use of that term in the Hancock Amendment because taxes are levied for support of the government. Brief of Appellants at 43. As Appellants also implicitly point out when they say that "Kansas City uses its earnings tax to provide a variety of municipal services, including law enforcement, fire suppression and ambulance services," Brief of Appellants at 43, there is a separation between the City's operations, i.e., its activities and services, and the power to tax. Activities and services as intended by the Hancock Amendment are those public goods and services which are provided directly for the benefit of the public.

The power to tax is fundamentally different from an activity or service under the Hancock Amendment. The power to tax is authority permissively granted to a city. *Berry v. State*, 908 S.W.2d at 685. It is not a service which a city provides for the benefit of its citizens, nor is it the underlying activity which comprises the service provided. In the context of the Hancock Amendment, it is not an activity or service which the State has dictated the city provide as part of its operations. As an authority permissively

granted to a city by the State, it has also long been recognized that the permissive grant of authority may be withdrawn by the State at its discretion. *Id.*, *citing Whipple v. City of Kansas City*, 779 S.W.2d 610, 613-14 (Mo. App. 1989). Nothing in the Hancock Amendment or its adoption supports the purpose asserted by Plaintiffs to restrict the grant of the power to tax to a city or to tie the hands of the State in withdrawing or further limiting the power to tax previously granted.

V.

(Responds to Point V of Appellants' Brief)

As Appellants correctly point out, the trial court's ruling should be affirmed if it can be sustained on any of the grounds raised in the motion to dismiss, whether those grounds were addressed in the court's order ruling the motion or not. Brief of Appellants at 23, *citing Kixmiller v. Board of Curators of Lincoln University*, 341 S.W.3d 711, 713 (Mo. App. W.D. 2011). In Point V of their brief, Appellants address a second Hancock Amendment grounds for dismissal that was raised at the trial court level but not specifically addressed in its order. This issue is whether the Hancock Amendment restricts only the State Legislature and not the enactment of statutes by the people through the initiative process.

A.

Appellants make the same procedural argument with respect to the alternate ground for dismissal as made in their first point and which are addressed by Respondents in the Standard of Review section of this brief. That discussion is incorporated by reference here.

B.

Appellants argue that Article X, Section 16 of the Hancock Amendment acts as a restriction on the exercise of the initiative under Art III, Sections 49 to 53. The portion of Article X, Section 16, at issue provides, "The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions. . . .

Implementation of this section is specified in sections 17 through 24, inclusive, of this article." Mo. Const. Art. X, §16. Section 21 of Article X, one of the implementing provisions specified in §16 states:

> The state is hereby prohibited from reducing the state financed portion of the costs of any existing activity or service required of counties and other political subdivisions. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

Mo. Const. Art. X, §21.

Appellants argue that because the word "state" was used in Article X, Section 16, and the words "general assembly" were used in Article X, Section 21, "state" must mean something other than "general assembly." Appellants' argument ignores the final sentence of Section 16, which provides that implementation of Section 16 is specified in the following sections of the Hancock Amendment, including Section 21. In its implementation of Section 16, Section 21 effectively gives meaning to the term "state" as involving both the general assembly and state agencies. Absent from the language of this implementing provision is reference to the power of the people. Article I, Section 1 of the Constitution references the ultimate and supreme power of the people and indicates how that sovereignty is differentiated from the institutions comprising the state government: "That all political power is vested in and derived from the people; that all

government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Mo. Const. Art. I, §1. In Section 2 of Article I, the Constitution likewise distinguishes the institutional forms of government established under the Constitution, referring to "the principal office of government." Mo. Const. Art. I, §2. In establishing the power of the initiative, the state's organic document references the initiative as a power of the people, stating, "The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly[.]" Mo. Const. Art. III, §49. When the Constitution wants to reference the powers of the people, it has clearly shown that it does so through the use of the term "people," as distinguished from the term "state" or the institutions which comprise it, i.e., the general assembly and state agencies. The language of the Hancock Amendment does not restrict the power of the people to enact measures by the initiative.

This distinction has been given recognition by the courts. In *Payne v. Kirkpatrick*, 685 S.W.2d 891, 903-04 (Mo. App. 1984), the court considered whether constitutional limitations on the power of the General Assembly also limited the ability of the people in their exercise of the right of initiative granted under Article III. Since the limitation in *Payne* was prefaced by the language, "The general assembly shall not have power," the court interpreted this as a limitation solely on the power of the general assembly. *Id.* The limitation did not apply to initiative petitions enacted under Article III, Section 49, the court noting, "Section 49 specifically distinguishes the reserved power of the people by initiative independent of the power of the Missouri General Assembly." *Id.* As noted

above, for purposes of the Hancock Amendment, the term "state" has two distinct components—the General Assembly and state agencies. Within the context of this case and the exercise of the initiative, the Hancock Amendment serves as a limitation on the power of the General Assembly. There is nothing in the language of the Hancock Amendment which serves as a limitation on the power of the people found in Article III, Section 49.

If it were assumed for sake of argument that the Initiative Petition involved an activity or service that was mandated of constitutional charter cities, the Hancock Amendment does not apply and does not restrict the use of the initiative to such a measure. Under Article III, Section 49, the people have specifically reserved the right to enact legislation and, as *Payne* points out, they did not fetter that right with the same types of limitations that they placed on the General Assembly in its exercise of the legislative power.

VI.

(Responds to Point VI of Appellants' Brief)

As Appellants correctly point out, the trial court's ruling should be affirmed if it can be sustained on any of the grounds raised in the motion to dismiss, whether those grounds were addressed in the court's order ruling the motion or not. Brief of Appellants at 23, *citing Kixmiller v. Board of Curators of Lincoln University*, 341 S.W.3d 711, 713 (Mo. App. W.D. 2011). In Point VI of their brief, Appellants address a third Hancock Amendment ground for dismissal that was raised at the trial court level but not specifically given as a reason for the trial court's judgment. This issue is whether the Initiative Petition actually involved a new or additional activity by requiring an election for voter approval of the earnings tax.

A.

Appellants make the same procedural argument with respect to the alternate ground for dismissal as made in their first point and which are addressed by Respondents in the Standard of Review section of this brief. That discussion is incorporated by reference here.

B.

The State Respondents argued below that the initiative measure required no new or expanded activity by cities because cities were already required to hold elections for municipal purposes. In their response to this contention below and under Point VI, Appellants focus on the fact that the City must hold an election and obtain voter approval if it wants to impose an earnings tax after December 31, 2011. They contend that this

violates the Hancock Amendment by imposing the requirement of an election in 2011 and every five years subsequently as a condition for imposing an earnings tax.

With respect to the initial election, Appellants' argument is not that the City must hold an election at all but that the initiative measure specified a particular date by saying that if the City wished to impose an earnings tax after December 31, 2011, it needed to hold an election on "the next general municipal election date immediately following the effective date of this section." As Appellants pointed out below, the governing body of the City exercised the discretion and made the policy choice to submit the issue to the voters of the City on April 5, 2011, and the measure was approved. L.F. 200. Any argument concerning this election and the date it was held – particularly one advanced by someone other than the governing body making the choice to hold the election – is moot at this point.

Further, Appellants misconstrue the language in Section 92.115.1, RSMo, to require the initial election to be held on April 5, 2011. Appellants point to the language "next general municipal election date" and seek to impose the construction that the language "next general municipal election date" was referring to the term "general municipal election day" in Section 115.121.1, RSMo. Appellants ignore that Section 92.115.1, RSMo, refers specifically to constitutional charter cities and that the provisions of Section 115.123, RSMo, make special allowances for the election dates of constitutional charter cities. That section allows for constitutional charter cities to provide expressly by charter for another day on which to hold its general municipal election. §115.123.1&.5, RSMo. The City of Kansas City's charter specified the fourth

Tuesday in March as its general election date. *See* Brief of Appellants at 48. The most obvious and only reasonable interpretation of the provision in Section 92.115.1, RSMo, is that it was referring to the next general municipal election as provided for in the applicable city charter. The City of Kansas City was not required to hold an election on the issue of imposing an earnings tax on a date separate from the election date already mandated under its charter.

As to any election to be held in the future, the provisions of Section 92.115.1, RSMo, requires that a city hold an election "once every five years" thereafter without designating a specific date on which the election will be held. Appellants are engaging in rank speculation as to whether any election for imposing an earnings tax after the authority for the present ones sunsets will be the only measure on the ballot. As Appellants admit, there are a number of dates available to a constitutional charter city to hold an election and to say now that the City of Kansas City will be forced to hold a single-measure election to obtain voter approval for imposing an earnings tax is based on pure conjecture.

More fundamentally, as the State Respondents pointed out, the City is already required to hold elections for municipal purposes, whether it be at general or special municipal elections, and to pay the costs of those elections. Kansas City Charter Art. VI, §§601 & 604; §115.071, RSMo. The Hancock Amendment refers only to new responsibilities imposed on local governments but not a continued responsibility to fund an existing activity. *Neske v. City of St. Louis*, 218 S.W.3d 417, 423 (Mo. App. 2007).

VII.

(Responds to Point VII of Appellants' Brief)

Point VII applies to the dismissal of Count IV of the Second Amended Petition. The trial court's order on this count stated, "With respect to any remaining issues in Count IV and in that the power to limit or deny powers to a constitutional charter city, limited only to issues relevant herein, rests with the people and/or the legislature. The claim will be dismissed with prejudice." L.F. 203. The gist of Appellants' argument is that the Initiative Petition amended the Kansas City's charter without following the procedures for such an amendment. Integral to this argument is Appellants' belief that the City's Charter is supreme law and that provisions and powers of the Charter are not subject to any restriction or withdrawal by higher authority. The problem with Appellants' position is that they confuse abrogation of a city's power by higher authority with an amendment of that authority.

A.

Appellants make the same procedural argument with respect to the dismissal of Count IV as made in their first point and which are addressed by Respondents in the Standard of Review section of this brief. That discussion is incorporated by reference here.

B.

Under Count IV of their petition, Appellants had argued that the state-wide power to enact statutes by the initiative power of Article III, Section 49 of the Missouri Constitution does not permit enactment of a statute which impacts Kansas City's charter

powers. They argued below and here that the only way the charter can be amended by initiative is pursuant to Article VI, Section 20. What Appellants fail to comprehend is that a measure enacted by the state-wide initiative power is not an amendment to the city's charter but the enactment of a statute. Article III, Section 49 reserves to the people the power "to propose and enact or reject laws...by initiative." Mo. Const. Article III, § 49 (emphasis added). Similarly, Article III, Section 50 specifically references "petitions proposing laws" and "[p]etitions for laws," and requires petitions to include an enacting clause which states, "Be it enacted by the people of the state of Missouri." Mo. Const. Art III, §50. The earnings tax initiative here clearly states that it is only repealing existing statutes dealing with the authority to impose an earnings tax and replacing them with amended statutes dealing with the authority to impose an earnings tax.

There is no language in Article VI, Section 20, the constitutional provision dealing with the procedures for amending a city charter, which purports to limit the power of the people under Article III, Section 49 to enact statutes through the initiative. There is nothing in Article VI, Section 20 which elevates charter powers above the legislative power to enact statutes or which has the effect of allowing charter cities to pre-empt or exclude the enactment of statutes related to municipal powers through the adoption of charter provisions.

The more fundamental flaw in Appellants' position is that the constitution specifically permits the enactment of statutes that limit or deny the exercise of a charter power in Article VI, Section 19(a). Article VI, Section 19(a), establishes a hierarchy under which constitutional charter cities may operate:

> Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute.

Mo. Const. Art. VI, §19(a) (emphasis added).[1] Under this hierarchy, "the emphasis is whether the exercise of that [the home rule] power conflicts with the Missouri Constitution, state statutes or the charter itself. . . .Once a determination of conflict between a constitutional or statutory provision and a charter or ordinance provision is made, the state law provision controls." *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986). *See also State ex inf. Hannah v. City of St. Charles*, 676 S.W.2d 508, 513 (Mo. banc 1984) ("Under §19(a), a constitutional charter city is prohibited from exercising its home rule power in a manner that is inconsistent with a state statute").

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[1]This hierarchy of Article VI, Section 19(a) is also reflected in and recognized by the Kansas City Charter, Sec. 102 (emphasis added):

> The City shall have all powers which the General Assembly of the State of Missouri has authority to confer upon any City, provided such powers are consistent with the Constitution of this State and are not limited or denied either by this Charter or by statute.

Statutory limitations on the home rule power of a city act at a wholly different level – a higher level – than the charter and represent the retained power to enact statutes (by the Legislature or through the initiative) which limit or deny powers to the charter city. Whatever requirements Article VI, Section 20 impose relative to the amendment of city charters, they do not operate on the retained power of Article VI, Section 19(a) to enact statutes limiting or denying powers to charter cities. When a statute denies a power to a charter city or limits a power of the charter city, it abrogates or supersedes the power by higher authority. *See, e.g.*, *City of St. Louis v. Doss*, 807 S.W.2d 61, 63 (Mo. banc 1991) (later enacted statute which conflicts with city provision supersedes the provision and renders the provision unlawful, citing Art. VI, §19 as authority for the proposition).

Here, the people through their initiative petition have limited the powers of charter cities to impose an earnings tax. The Missouri Constitution expressly provides for this action, as the Constitution provides that the powers of cities may be limited or denied by statute. The earnings tax initiative is an exercise of specific power and authority granted under Article VI, Section 19(a) of the Missouri Constitution and the enactment of statutes pursuant to it are not restricted by the process for amending charter provisions under Article VI, Section 20.

This Court has a long history of determining that statutes may be enacted which may implicitly or directly change provisions of city charters. One hundred and twenty years ago, the Missouri Supreme Court in *Ewing v. Hoblitzelle*, 85 Mo. 64, 1884 WL 9598 (Mo. 1887), addressed a similar argument that adoption of a charter by the City of St. Louis made the city *imperium in imperio* and emancipated it from any further control

through state enactments. *Id.* at *5. The Court rejected this argument out of hand and stated:

> [T]he idea that it [the charter] was thereby intended to create a sovereignty, and deny to the state the right of control, is, we think, completely overthrown by the following limitations or conditions imposed by section 23, article IX, viz: "Such charter and amendments shall also be in harmony with and subject to the constitution and laws of the State of Missouri."

Id. The city charter, the Court concluded "'shall always be in harmony with and subject to the Constitution and laws of the state.'" *Id* at *6. *See, also, City of St. Louis v. Dorr*, 41 S.W.1094 (Mo. 1897), and *City of St. Louis v. Doss*, 807 S.W.2d 61 (Mo. banc 1991).

Accordingly, the law of the State of Missouri is clear that the state, whether by statutory initiative or by statutory enactments by the legislature, may adopt laws which affect powers contained in city charters and such city charters cannot stand before such laws.

Initiative Petition 2010-077 is not contrary to the provisions of Article VI, Section 20. Dismissal of Count IV is appropriate.

CONCLUSION

The trial court correctly dismissed Appellants' petition for failure to state a claim for relief. The Initiative Petition did not involve a "*de facto*" appropriation in violation of Article III, Section 51 of the Missouri Constitution. Nor is there a violation of the unfunded mandate portion of the Hancock Amendment, Article X, Sections 16 and 21, as the measure does not mandate constitutional charter cities to impose an earnings tax and any requirement for voter approval of an earnings tax results from the constitutional charter city's voluntary decision to impose such a tax as a source of revenue. Finally, the people have retained the right to enact statutes pursuant to Article III, Section 49, and, when they do so, those statutes control over and abrogate any contrary provisions in a constitutional charter city's charter. The enactment of statutes by initiative is not an amendment of city charter provisions contrary to the initiative enactment and there is no violation of Article VI, Section 20.

The judgment of the trial court should be affirmed either for the reasons given by the trial court or for the alternate grounds justifying dismissal of the Appellants' action discussed here.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Respondent's Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 11,378 words, as calculated by counsel's word processing program;

(B) It was prepared using Microsoft Word 13 point Times New Roman font; and that

(C) It was electronically filed through the Missouri eFiling System of the Missouri Courts and served on the parties shown as eFiling participants in the records of the case.

/s/ Thomas W. Rynard

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing pleading was served electronically, this 5th day of March, 2012, to:

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